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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FELIX TORRES HERNANDEZ, Defendant and Appellant.	B205327 (Los Angeles County Super. Ct. No. GA066977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice Claire Croft, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Felix Hernandez appeals from the judgment entered following a jury trial in which he was convicted of nine counts of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd (a)), two counts of sexual penetration against a child under the age of 16 (*id*., § 289, subd. (i)), two counts of sexual penetration against a victim under the age of 18 (*id*., § 289, subd. (h)), and one count of continuous sexual abuse (*id*., § 288.5, subd. (a)). (Further statutory references are to the Penal Code.) As to all counts, the jury further found that the statute of limitations had been extended under section 803, subdivision (f). Defendant contends that six of the lewd act convictions (counts 1–6) must be reversed because extension of the statute of limitations was not supported by evidence of substantial sexual conduct. We affirm.

BACKGROUND

S.R. was born in September 1977. As of age two, she lived in a household that included defendant, who is her stepfather. Defendant started molesting S.R. when she was five or six years old and continued to be sexually intimate with her for the next two decades. When S.R. was 17 years old, she became pregnant by defendant. S.R. left the household in 2003. In 2006, S.R. went to the police. At the direction of law enforcement officers, she made pretext telephone calls to defendant. During these calls, defendant professed his love for S.R. and asserted that he never forced her to have sex.

Counts 1 through 6, which are the subject of this appeal, alleged that defendant committed lewd acts upon S.R. over six successive periods from February 1988 through January 1990. With respect to these counts, S.R. testified that defendant drilled a hole in the door that separated a bathroom from the bedroom in which S.R. slept. At a frequency of "like every other day," defendant would look through the hole at S.R. and give her instructions on what do to. These instructions included telling S.R. to pull down her pants, to "pose" while she would "bend down or to open [her] legs in a certain way," to "open [her] vagina," and to touch her vagina with her fingers. When S.R. was touching her vagina, she was "always fully bent over."

In defense, three of defendant's children who had been in the household testified they were unaware of any molestations and that it was not possible for the S.R. to have been molested by defendant without them knowing it.

Defendant was sentenced to state prison for 42 years 8 months.

DISCUSSION

Defendant does not dispute that his conduct with respect to counts 1 through 6 satisfied the element of section 288, subdivision (a), requiring a touching "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child." Nor could he. Under well settled law, "the touching necessary to violate Penal Code section 288 may be done by the child victim on its own person providing such touching was at the instigation of [the defendant]." (*People v. Austin* (1980) 111 Cal.App.3d 110, 114.)

Rather, defendant contends that there was insufficient evidence to support the section 803, subdivision (f) findings on counts 1 through 6 because there was no proof of mutual masturbation, and therefore insufficient evidence of substantial sexual conduct as required by the statute. We disagree.

Section 803, subdivision (f)(1) provides that "a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261 [rape], 286 [sodomy], 288 [lewd act], 288a [oral copulation], 288.5 [continuous sexual abuse], or 289 [penetration by foreign object], or Section 289.5 [flight from state to avoid prosecution] . . . relating to penetration by an unknown object." The statute has further qualifications for extending the statute of limitations, including that "[t]he crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual." (§ 803, subd. (f)(2)(B).) Section 1203.066, subdivision (b) provides: "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

On appeal, as in the trial court, the argument on this issue focused on *People v. Lamb* (1999) 76 Cal.App.4th 664 (*Lamb*). In *Lamb*, the defendant "would apply Vaseline to [11- or 12-year-old victim] Randy's penis and proceed to masturbate Randy's penis with his hands. Randy never reciprocated by masturbating [the defendant]." (*Id*. at p. 670.) The defendant contended that mutual masturbation referred to in section 803, subdivision (f)(2)(B) occurs only "when sexual partners masturbate each other." (*Lamb*, at p. 678.) *Lamb* rejected this argument.

As part of its analysis, the *Lamb* court reviewed the legislative history of provisions extending the statute of limitations and noted that "[t]he exception for 'masturbation that is not mutual' was added by the Senate on June 18, 1992 . . . .[**1**] The amendment was apparently prompted by the following comment contained in a report prepared for a June 9, 1992, hearing of the Senate Committee on the Judiciary: 'Under the new exception to the statute of limitations created by this bill, the offense must involve substantial sexual conduct; this would be defined to mean penetration of the vagina or rectum by the penis of the offender or by any foreign object, oral copulation, or masturbation of either the victim or the offender. [¶] Opponents suggest that masturbating in the presence of a 17 year old should not be considered substantial sexual conduct under this bill. *Perhaps the definition of substantial sexual conduct* [*should*] *be amended so that masturbation would be included in the definition only if the perpetrator masturbated the victim or coerced the victim to masturbate the perpetrator.*' [Citation.]

"[N]ine days after the hearing for which this report was prepared, the 'masturbation which is not mutual' language was added to the legislation. No other explanation for it, beyond the sentence (italicized above) in the prehearing report, appears anywhere in the legislative history." (*Lamb*, *supra*, 76 Cal.App.4th at pp. 678–679.)

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1 When section 803 was enacted, the relevant language was in subdivision (g). In 2005, the language was moved to subdivision (f). (Stats. 2005, ch. 479.)

The *Lamb* court concluded that the legislative history provided useful guidance but continued that the conclusion "brings us back to the meaning of the word 'mutual,' or at least that meaning as used in this context. To be sure, '[t]he ordinary definition of "mutual" is "reciprocally given and received."' [Citation.] This is also the view of many authoritative dictionaries of the English language, including legal dictionaries, which include an element of reciprocity in their primary definition of 'mutual.'

"However, and as the People point out, 'masturbation' may refer either to the stimulation of one's own genitals or to the stimulation of another's genitals. [Citation.] Since masturbation may involve one participant or two, the People contend that the phrase 'masturbation that is not mutual' refers to masturbation involving one person, i.e., self-masturbation. Thus, they continue, the term 'mutual masturbation' could include one sexual partner's stimulation of another or two people stimulating themselves in each other's company. In support of this contention, the People note, correctly, that although 'mutual' can mean 'reciprocal,' it can also mean 'joint' or 'shared in common.' [Citation.]

"We agree with the People's contention because (1) their definition of the term 'mutual' ('shared,' etc.) is consistent with the purpose of the statute in which the words appear (and, of course, our definition relates only to that statute) and (2) the interpretation advanced by appellant is clearly inconsistent with that purpose. As noted above, the Legislature was concerned that, if it adopted the definition of 'substantial sexual conduct' set forth in section 1203.066, the proposed extended statute of limitations would apply to an offender who merely masturbated in the presence of another. The only satisfactory explanation for the exclusion with which we are dealing is a legislative effort to address that concern. Despite the fact that the concept of mutuality often connotes an element of reciprocity, it is also often used to describe an arrangement or activity shared by two or more people—e.g., a mutual fund.

"Appellant nevertheless argues that his proffered interpretation of mutual masturbation is the only logical one. He reasons as follows: (1) 'substantial sexual conduct' as defined in section 1203.066 includes 'masturbation of either the victim or the

offender'; (2) that definition already covered masturbation of the victim by the offender or of the offender by the victim; (3) in amending the bill, the Legislature intended to be more restrictive; (4) thus, the phrase 'excluding masturbation that is not mutual' must mean something else, i.e., reciprocal masturbation.

"This argument is based on a false premise. The problem of concern to the Legislature was not that the extended statute of limitations would include masturbation by the offender of the victim or of the offender by the victim, but that it would *also* include masturbation by the offender *of himself* in the presence of the victim, because the definition of substantial sexual conduct in section 1203.066 includes 'masturbation of either the victim or the offender' and therefore does not require the sexual act to be performed by one person upon another.

"Finally, the definition urged by appellant would obstruct a clear legislative purpose, if not also render the statute absurd. If, as appellant claims, the 'mutual masturbation' referred to in section 803, subdivision ([f]), excludes the unilateral masturbation of the victim by the offender, it would by parity of reasoning also exclude the masturbation of the offender by the victim. It is impossible to think the Legislature did not intend the extended statute of limitation to apply to the circumstances in which masturbation of an offender by a victim would most commonly be chargeable as a crime, i.e., where the victim is a minor or an unconsenting adult acting under compulsion. In either of those circumstances, masturbation would clearly be within the legislative concept of 'substantial sexual conduct' worthy of subjection to the extended statute of limitations." (*Lamb*, *supra*, 76 Cal.App.4th at pp. 680–682, fns. omitted.)

Lamb thus teaches that mutual masturbation occurs when the defendant masturbates the victim, when the victim masturbates the defendant, or when the defendant and the victim masturbate themselves in each other's company. (*Lamb*, *supra*, 76 Cal.App.4th at pp. 680–682.) In each of these situations both the defendant and the victim are active participants. But as to an offense involving a defendant's self-masturbation in the presence of a victim—to which the extended statute of limitations

does not apply—the only active participant is the defendant and the victim is a passive, unwilling viewer of the defendant's conduct.

As noted in *Lamb*, it is impossible to think that the Legislature would have intended to exempt from the extended statute of limitations a defendant who masturbated his victim. (*Lamb*, *supra*, 76 Cal.App.4th at pp. 681–682). We conclude it is equally impossible to think that the Legislature would have intended to exempt defendant's direct participation in the masturbation that occurred here, directing S.R. to pose repeatedly in sexual positions and to insert her fingers into her vagina while defendant derived sexual pleasure from watching her through a peep hole in the door. Because both defendant and S.R. were involved in the "masturbation of . . . the victim" (§ 1203.066, subd. (b)), the masturbation in this case must be deemed "mutual."

Based on the foregoing, we conclude that defendant's conduct in counts 1 through 6 constituted substantial sexual conduct under section 1203.066, subdivision (b) that did not fall within section 803, subdivision (f)(2)(B)'s exclusion of "masturbation that is not mutual." Defendant's argument to the contrary must therefore be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P.J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.